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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS AS AMICUS CURIAE SUPPORTING RESPONDENTS

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BRIEF OF THE ALLIANCE OF MOTION PICTURE AND TELEVISION PRODUCERS AS AMICUS CURIAE SUPPORTING RESPONDENTS

This brief, in support of Respondents Pro Football, Inc., *et al.*, is submitted in accordance with Rule 37 of the Rules of this Court. The Alliance of Motion Picture and Television Producers ("AMPTP") has obtained and is filing herewith the written consent of Petitioners and Respondents to the submission of this brief.

INTEREST OF THE AMICUS

AMPTP represents in multi-employer collective bargaining approximately two hundred companies that produce filmed entertainment for exhibition in theaters and on television (hereinafter "the motion picture industry"). AMPTP conducts such bargaining with thirty-five guilds and unions (hereinafter collectively "unions") that represent employees in the industry. Because labor relations in the motion picture industry may be profoundly affected by the Court's decision, this case is a matter of vital concern to the employers in the industry.

SUMMARY OF ARGUMENT

The circumstances of multi-employer collective bargaining in the motion picture industry differ from those of bargaining in a professional sports league. Because the firms in the industry are not a joint venture, there is no structural necessity for multi-employer bargaining. Employers and unions engage in such bargaining voluntarily because both find it advantageous; either side will abandon it if it no longer appears advantageous. Thus, employees in the industry do not have to choose between collective bargaining and antitrust protection. They can enjoy all rights under the NLRA and whatever protection antitrust law may provide by choosing to bargain in single-employer units.

Adoption of the Solicitor General's position would threaten the continuation of multi-employer bargaining in this and similar industries. During impasse, if a union

used whipsaw tactics, the employers would be deterred by antitrust law from responding with concerted use of economic weapons. Even if employers acted individually during impasse, they would still face daunting antitrust risks because the limited options permitted by labor law would ensure some parallel conduct, and the duty to conduct any renewed negotiations concertedly would necessitate communications among the employers about terms of employment.

National labor policy applies to, and the NLRA adequately governs, employer conduct in a labor market subject to collective bargaining. The NLRA establishes a process that includes bargaining in good faith and resort to economic weapons in aid of bargaining. Impasse is merely a stage in that process.

The national labor policy and labor law principles that apply to single-employer bargaining units also apply to multi-employer units. Labor law addresses adequately the additional considerations raised by a multi-employer unit. Under labor law, concerted unilateral imposition by employers in a multi-employer unit of terms previously offered to the union is a permissible economic weapon during impasse. Unilateral imposition of terms is not different in kind from other economic weapons available to parties in a labor dispute.

A labor market subject to collective bargaining is, at most, peripheral to antitrust law. Historically, there has been little antitrust interest in conduct that affects only a labor market. Antitrust can contribute little to resolution of a labor dispute because, almost always, antitrust would be merely one among many influences on the terms of the collective bargaining agreement that eventually resolves the dispute.

Conduct affecting only a labor market subject to collective bargaining should be governed by labor law, not antitrust law. Both laws concern process, not results. Here, the process of labor law (collective bargaining backed by economic weapons) should prevail over the process of antitrust (competition). An exemption from

the antitrust laws for the entire collective bargaining *process* is necessary to fulfill national labor policy.

In any event, the Court should protect the concerted lockout as a necessary defense against whipsaw tactics.

ARGUMENT

I. THE CIRCUMSTANCES OF MULTI-EMPLOYER COLLECTIVE BARGAINING IN THE MOTION PICTURE INDUSTRY ARE QUITE DIFFERENT FROM THE CIRCUMSTANCES OF BARGAINING IN A PROFESSIONAL SPORTS LEAGUE.

There are important differences in the organization of work and in economic structure between the motion picture industry and a professional sports league. Due to those differences, our industry provides a setting for multi-employer collective bargaining quite different from that of a league.[1]

In the motion picture industry, work by the unionized employees generally is project-based, and therefore episodic. An employee generally does not work for only one employer, but, rather, for a particular employer on a particular film project for a period of weeks or months; and, when that project is finished, the employee may work on a different project for a different employer. During the course of a year, an employee may work for several different employers; and compensation may vary from project to project. In a sports league, by contrast, a player signs a contract with a particular team for one or more entire seasons, and plays under that contract throughout its duration; even after a trade, the player continues to be subject to the same contract (but with a different contracting party).

Unlike the teams in a sports league, the firms in the motion picture industry are not organized as a single

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[1] The offhand statement in Petitioners' Brief [hereinafter "Pet. Br."] 44 that the structures of the two industries are the same is, as will be shown, demonstrably incorrect.

joint venture.[2] Motion picture production companies operate independently of one another. In this industry, there is no organization analogous to the NFL in professional football. Therefore, there is no structural necessity for multi-employer bargaining.[3] Such bargaining occurs only because each union and each employer involved finds it advantageous.

In the motion picture industry, multi-employer collective bargaining has existed for decades, and is entirely voluntary on both sides. The employees are represented not just by one union, but by thirty-five.[4] There are no certified bargaining units. The employers have not challenged the claims by the unions to represent their respective members, and the multi-employer unit within which

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[2] There are also no multi-employer restraints on free movement of employees, such as those in a sports league.

[3] In *North American Soccer League v. NLRB*, 613 F.2d 1379 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980), the Board and the court both found that a multi-employer bargaining unit was appropriate because "the League exercises a significant degree of control over essential aspects of the clubs' labor relations." 613 F.2d at 1382. No such finding has been made, or is possible, with respect to the motion picture industry. There has never been a determination by the NLRB or any court with respect to a multi-employer bargaining unit in the motion picture industry.

[4] AMPTP bargains with the American Federation of Television and Radio Artists; The American Federation of Musicians of the United States and Canada; Directors Guild of America, Inc.; International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, and its twenty-three West Coast Studio Locals; Screen Actors Guild, Inc.; Writers Guild of America, West, Inc.; Writers Guild of America, East, Inc.; Studio Transportation Drivers, Local #399 of the International Brotherhood of Teamsters; International Brotherhood of Electrical Workers, Local #40; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local #78; Southern California District Council of Laborers and its affiliate, Studio Utility Employees, Local #724 (both affiliated with the Laborers' International Union of North America, AFL-CIO); and the Operative Plasterers and Cement Masons International Association of the United States and Canada, Local #755.

bargaining with each union takes place has developed entirely by mutual consent of unions and employers. Although there have been labor disputes, impasses, and strikes from time to time, collective bargaining in the industry is well-established, the multi-employer unit is stable,[5] and in 175 negotiations since 1982, 170 have resulted in a collective bargaining agreement without resort by either side to economic weapons. This record of relative labor peace has benefitted the consuming public as well as the parties.

Thus, in the motion picture industry, employees do not face the stark choice posed by the court of appeals between "the protections of the NLRA or the Sherman Act," Pet. App. 30a. They need not, as Judge Wald put it, "forfeit" either set of protections in order to enjoy the other, Pet. App. 34a. If employees are dissatisfied with multi-employer bargaining or for any other reason want to preserve whatever antitrust remedies are available against concerted employer conduct in the market for their labor, the employees can, through their union, withhold consent from multi-employer bargaining and, instead, bargain with the employers individually, with full enjoyment of all rights under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1994) ("NLRA"). *See, e.g., Detroit Newspaper Publishers Ass'n v. NLRB*, 372 F.2d 569 (6th Cir. 1967) (unions may unilaterally withdraw from multi-employer bargaining unit and bargain with employers individually).

Except in an industry organized as a single joint venture, employees can always have collective bargaining. The choice is not between collective bargaining and antitrust protection, but between *multi-employer* bargaining and antitrust protection. Giving up antitrust protection is simply a corollary of *consenting* to bargaining with a *group* of employers *for the very purpose* of having them

[5] From 1975 to 1982, the employers formerly in a single multi-employer unit broke into two separate multi-employer units. Since 1982, however, the members of the AMPTP have negotiated as a single unit with all of the unions.

act concertedly in the bargaining process. Similarly, because in the motion picture industry there is no structural necessity for multi-employer bargaining, employers can insist on single-employer bargaining if they view that as more advantageous. In contrast, in the case of a sports league, multi-employer bargaining appears to be a necessity.

For the unions in our industry, multi-employer bargaining provides at least the following advantages. First, where work is episodic, employees generally do not work long enough for a single employer to qualify for health and pension benefit plans; therefore, by far the most practical way to establish such plans is on a multi-employer basis. Second, multi-employer bargaining makes it easier for the unions to obtain standardization of scale compensation, other terms of employment, and working conditions throughout much of the industry; and it establishes a pattern likely to be accepted by employers outside the multi-employer unit. Thus, when employees move from employer to employer, most of them work under essentially the same terms and conditions of employment. Third, multi-employer bargaining provides substantial savings in transaction costs for negotiating and administering collective bargaining agreements.[6] For the unions, multi-employer bargaining has two main disadvantages: (i) the effectiveness of whipsaw strikes and other whipsaw tactics is eliminated or greatly diminished by employers' ability to use concerted defensive weapons, and (ii) employers may concertedly use the same weapons offensively in the bargaining process.

The employers also benefit to some extent from increased efficiency attributable to standardization of terms and conditions and from savings in transaction costs. Their primary and overriding benefit, however, is from

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[6] Additional advantages of multi-employer bargaining to unions generally are discussed in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 409 n.3 (1982); Jan Vetter, *Commentary on "Multiemployer Bargaining Rules": Searching for the Right Questions*, 75 Va. L. Rev. 285 (1989).

the ability to use economic weapons in concert. For them, the principal disadvantage is that the unions can shut down the entire industry with a strike, and their power to do so is an ever-present factor in the bargaining.

Finally, in the motion picture industry, unlike professional sports leagues, there has been no litigation with respect to the use of economic weapons in a labor dispute. There is no judicial experience with the application of antitrust law to collective bargaining and labor relations generally in this industry.

II. THE POTENTIAL EFFECTS OF THIS CASE ON COLLECTIVE BARGAINING IN THE MOTION PICTURE INDUSTRY RAISE CONCERN.

If the decision below were rejected on a basis applicable to the motion picture industry, the framework for bargaining in that industry would be shattered in a way likely to lead to much more troubled labor relations. The likely result is erosion or elimination, from the employer side, of the multi-employer unit.

The Solicitor General's position is that the non-statutory exemption would terminate at impasse (or as soon as counsel can advise that impasse has been reached). Brief for the United States and the Federal Trade Commission as *Amici Curiae* Supporting Petitioners [hereinafter "S.G. Br."] 7. Thereafter, there would be no non-statutory exemption for any concerted action by the employers (other than renewed participation in negotiations). *Id.* at 18. Antitrust claims could be brought against employers not only for concerted unilateral imposition of terms (as occurred in this case), but also for concerted maintenance of the status quo, a concerted lockout (including a concerted defensive lockout in response to a whipsaw strike), and any other concerted use of an economic weapon offensively or defensively.[7]

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[7] The Solicitor General's position thus goes far beyond the position of Judge Wald, who would provide no exemption for concerted imposition of terms, but would apply the non-statutory exemption

Under the Solicitor General's view, once impasse is reached, the union could engage in whipsaw tactics and the employers could not respond with a defensive concerted lockout without risking treble damage liability for a *per se* antitrust violation. The union could also use or threaten whipsaw tactics to extract interim agreements from weaker employers, but the employers could not respond (without antitrust risk) with either concerted maintenance of the status quo or concerted unilateral imposition of terms; nor could an individual employer withdraw from the multi-employer unit and negotiate a separate permanent agreement.

Moreover, even while pursuing whipsaw tactics, the union could signal its readiness to resume bargaining. The employers would then have a duty to bargain concertedly. Each meeting of the employers in connection with the negotiations could be used by the union as further evidence of an alleged conspiracy. The employers' discussions at such meetings would arguably be subject to discovery in antitrust litigation brought by the union. The chilling effect on collective bargaining would be substantial.

Thus, the logic of the bargaining process would create an enormous incentive for a union to bargain to impasse, because then its economic weapons become much stronger and the employers' weapons much weaker (because no longer permissibly concerted).

Petitioners contend that the decision below would create the same kind of incentive on the employers' side to bargain to impasse to be able to impose terms uni-

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to concerted use of other economic weapons. *See* Pet. App. 53a n.7. Petitioners appear to be of two minds on this point. Their general position is that the non-statutory exemption is coextensive with a collective bargaining agreement, so that, without the consent of the union, there would be no non-statutory exemption for any use of an economic weapon by employers (before or after the reaching of impasse). *See, e.g.*, Pet. Br. 18. However, at Pet. Br. 40, petitioners endorse Judge Wald's position. *See also* Pet. App. 22a-23a (reference to petitioners' position below).

laterally. For two reasons, however, the situations of unions and employers are not symmetrical, and unions would have much stronger incentives and opportunity to bargain to impasse than would employers.

First, in most circumstances, a union's ability to use whipsaw tactics with a threat of an antitrust claim against any concerted employer defense is a more powerful weapon than the employers' ability concertedly to impose terms unilaterally.

Before impasse, employers could respond to a whipsaw strike or other whipsaw tactic by a concerted lockout or other concerted defensive action. After impasse is reached, however, any such action by the employers would risk antitrust liability, in most circumstances for an alleged *per se* violation. Thus, the threat of treble damage liability would strongly deter the employers from any concerted defense. The employers' principal advantage from multi-employer bargaining would thereby be destroyed.

The employers' option at impasse to impose terms offered to the union is, in general, not nearly so powerful. That option does not destroy any defenses: the union can still strike or use other tactics. Moreover, the option has value only if the terms offered are materially less generous than the status quo. In an economy characterized by increasing productivity and by inflation, employers' good faith offers to unions will, in general, be more generous than the status quo. Concerted unilateral imposition of such terms is not an economic weapon at all, except as a possible defensive response to a strike (in the hope that the more generous terms will attract the employees back to work).

Second, it would be easier for a union than for an employer to conceal a strategy of deliberately bargaining to impasse. Although unions (like employers) have a duty to bargain in good faith, as a practical matter a union could bargain to impasse on any of a variety of mandatory subjects of bargaining. The union could simply adhere to one or another apparently legitimate demand for improvement in pay or benefits or working

conditions. By contrast, the employers would have to (i) propose a term materially less generous than the status quo, and, probably, (ii) adhere to that proposal until impasse. In most circumstances, such conduct would be an obvious signal of bad faith. Employers whose overall bargaining strategy is to offer terms less generous than the status quo, with no reasonable basis for belief that the union would accept them, in order to drive the negotiations to impasse so that those terms could be imposed unilaterally, would very probably be found to have committed an unfair labor practice. *See, e.g.*, 1 Patrick Hardin (ed. in chief), *The Developing Labor Law* 625-27 (3d ed. 1992) (citing cases) [hereinafter "Hardin"]. In a multi-employer unit, moreover, multiple employers would have to agree on the strategy; and that agreement would be reflected in communications subject to scrutiny in a later unfair labor practice proceeding. Thus, it is more difficult for multiple employers, than for a single union, to conduct and to conceal an unlawful bargaining strategy. If any unfair labor practice is found, any unilateral imposition of terms is improper.[8] Thus, generally that would not be a viable strategy for employers.[9]

The Solicitor General's position threatens multi-employer bargaining for additional reasons. Even if employers act unilaterally during impasse, the employees are likely to have a non-frivolous basis for an antitrust claim based on (i) parallel conduct (because, under labor law, employers' options during impasse are limited to maintenance of the status quo, imposition of terms offered to the union, and lockout) and (ii) meetings among the employers, necessary for good faith concerted bargaining as required by labor law, at which the parallel conduct could have been agreed to. As a practical matter, simul-

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[8] See n.17, *infra*.

[9] Petitioners' analysis of incentives would apply, under current law, to an employer in a single-employer unit. It has not been thought, however, that the risk that individual employers will improperly bargain to impasse so as to be able to impose terms justifies a ban on unilateral imposition of terms.

taneous duties (i) under labor law to bargain concertedly, and (ii) under antitrust law to act individually would create an extraordinarily fertile field for antitrust claims.

If the bargaining process is punctuated by a series of impasses and resumed negotiations, the problems for employers are aggravated. The Solicitor General does not address whether, after the first impasse and while renewed negotiations are ongoing, the non-statutory exemption would immunize the employers' concerted use of economic weapons defensively or offensively. If the answer is that it would not, then the incentive for a union to reach impasse is increased, because then the first impasse ensures that the employers will be under an antitrust threat if they take any concerted action during any subsequent negotiations as well as during any impasse. If the answer is that the exemption would cover concerted use of economic weapons during resumed negotiations, then assessment of the antitrust risk becomes very complicated. Although the exemption turns on and off with the negotiations, any similarity in the employers' conduct during periods of impasse and periods of negotiation can be exploited in antitrust litigation.

Faced with the logic of the Solicitor General's position if it were adopted by this Court, employers in our industry are likely to conclude that the benefits of multi-employer bargaining no longer outweigh the risks. Without multi-employer bargaining, the employers would risk whipsaw tactics, but that risk would be present even with it once impasse is reached. The employers would give up the savings in transaction costs and whatever gains in efficiency they derive from standardization of terms and conditions; but those advantages probably would not outweigh the new and inescapable antitrust risks of multi-employer bargaining.

If Judge Wald's position were adopted, the results for multi-employer bargaining in our industry would be less severe, *see* pp. 29-30, *infra*, but still adverse. Unilateral concerted implementation of terms or concerted maintenance of the status quo—principal defenses against

whipsaw interim agreements—would carry antitrust risk.[10] The principal remaining concerted economic weapon to protect the bargaining unit from whipsaw tactics and bring the union back to the table would be a lockout—a more painful, and less desirable, weapon for all concerned.

In sum, in the realities of collective bargaining, the two sides of the issue presented here are not mirror images. In the vast majority of circumstances, whipsaw tactics and antitrust claims threaten the multi-employer unit in a way and to a degree that imposition of previously offered terms does not.

III. CONCERTED MULTI-EMPLOYER CONDUCT SOLELY AFFECTING A LABOR MARKET SUBJECT TO COLLECTIVE BARGAINING SHOULD BE GOVERNED BY LABOR LAW, NOT BY ANTITRUST LAW.

This case involves matters central to national labor policy, but, at most, peripheral to the antitrust laws. *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657, 664 (1965).

The NLRA establishes for employers and employees a comprehensive process for "the ordering of the parties' industrial relationship through the formation of a contract." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960). Multi-employer bargaining and employers' concerted use of economic weapons permitted by labor law in aid of bargaining are "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB v. Truck Drivers Local 449, Int'l Bhd. of Teamsters ("Buffalo Linen")*, 353 U.S. 87, 95 (1957). This Court in *Insurance Agents* got to the heart of the matter: "The presence of economic weapons in reserve and their actual exercise on occasion by the parties, is part and parcel of

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[10] The Solicitor General's comment that the rule of reason "may" protect such conduct, S.G. Br. 19 n.5, is small comfort to employers who face the risk of treble damages. Moreover, Congress did not intend antitrust juries to substitute for the NLRB in administering a code of conduct for labor relations.

the system that the Wagner and Taft-Hartley Acts have recognized." 361 U.S. at 489. As is illustrated by the experience of collective bargaining in our industry (since 1982: 175 negotiations, and 170 agreements without resort to economic weapons), the *availability* of the economic weapons, with only occasional use, generally is sufficient to drive the parties to agreement. That is how Congress intended the process to work.

In contrast, a labor market with a multi-employer collective bargaining process that affects only that market is peripheral to the antitrust laws because (i) there is no antitrust interest in competition among the employees, *e.g., Pennington*, 381 U.S. at 664 (citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 664 (1940)); and (ii) there is no antitrust interest in competition among the employers in the unionized labor market: [11] whether such competition is preserved, restricted, or eliminated depends entirely on the parties' collective bargaining agreement.[12]

This Court has never held that concerted multi-employer conduct that is permitted by labor law in the collective bargaining process and that directly affects only the labor market is subject to the antitrust laws; and it should not do so now.[13]

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[11] In both *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1926), and *Radovich v. NFL*, 352 U.S. 445 (1957), there was no recognized union and no collective bargaining.

[12] *If* the collective bargaining agreement preserves any competition among the employers with respect to terms and conditions of employment, and *if* antitrust principles apply to such competition (a question not raised by the instant case), the applicability of antitrust law derives not independently from the decision of Congress to enact the law but from the decisions of the parties to the collective bargaining agreement (by virtue of power vested in them by the NLRA) to make the law applicable. Such a situation does not reflect an independent and strong antitrust interest in governing conduct in such markets.

[13] In the four cases in which the Court has considered the non-statutory exemption—*Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945); *Pennington*, 381 U.S. 657; *Local Union 1809, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965);

A. National Labor Policy Applies to, and the NLRA Adequately Governs, Employer Conduct in a Labor Market Subject to Collective Bargaining.

"The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). "[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 680-81 (1981). Thus, petitioners' view of national labor policy as favoring employees and unions, Pet. Br. 19, is incorrect. Once employees' organizational and representational rights are protected, national labor policy is neutral as between employees/unions and employers.

Under national labor policy and the NLRA, once a group of employees have chosen a union to represent them, their employer is required to bargain with their union. The duty of the employer (as well as the union) is to bargain in good faith, albeit with no duty to reach agreement on particular terms. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970). "[T]he Act provides a *framework* for the negotiations; it 'is concerned primarily with establishing an *equitable process* for determining terms and conditions of employment.'" *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 616 (1986) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985)) (emphasis added).

The framework for this "equitable process" embraces the duty to bargain in good faith and the use of economic weapons in aid of bargaining positions. "[T]he use of

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and *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975)—the antitrust concern focused on an effect on a product market. In *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court did not reach the claim presented under the exemption because it held that the union lacked antitrust standing.

economic pressure by the parties to a labor dispute is not a grudging exception . . . ; it is part and parcel of the process of collective bargaining." *Insurance Agents*, 361 U.S. at 495.

Thus, as a matter of labor law, each side has offensive and defensive economic weapons. Before or during impasse, a union can strike, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962); and an employer can respond by hiring permanent replacements. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). Before or during impasse, a union can conduct a slowdown or peaceful harassing tactics; and an employer can respond by discharging employees who violate work rules. *Insurance Agents*, 361 U.S. at 493. During impasse, a union can seek an interim agreement; an employer can respond by unilaterally imposing terms it had previously offered to the union. *NLRB v. Katz*, 369 U.S. 736 (1962). Before or after impasse, an employer can lock out its employees and hire temporary replacements; *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown Food Store*, 380 U.S. 278 (1965); and a union can respond by picketing to publicize the labor dispute and signal others not to enter the employer's premises, *Thornhill v. Alabama*, 310 U.S. 88 (1940), and by seeking assistance from companies that do business with the employer (but not from their employees), *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964). All of these economic weapons are affirmatively permitted by national labor policy, in aid of resolution of labor disputes by collective bargaining.[14]

Indeed, this Court has held that, to the extent permitted by labor law, the use of economic weapons in aid of collective bargaining is a right guaranteed by national labor policy against regulation under other laws. " '[R]esort

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[14] Use of any of these weapons in a manner or for a purpose inimical to collective bargaining, is prohibited. *See, e.g., American Ship*, 380 U.S. at 308 ("[T]here is here no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining.").

to economic weapons should more peaceful measures not avail' is *the right* of the employer as well as the employee . . . ." *Local 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147 (1976) (footnote & citation omitted; emphasis added; alteration in original). When the Court referred to "the right," it was stating national labor policy, not state law. Similarly:

> In *Machinists* we reiterated that *Congress intended to give parties to a collective bargaining agreement the right* to make use of "economic weapons," not explicitly set forth in the Act, free of governmental interference. 427 U.S. at 150. "[T]he congressional intent in enacting the comprehensive federal law of labor relations" required that certain types of peaceful conduct "must be free of regulation." *Id.*, at 155. The *Machinists* rule creates a free zone from which all regulation, "*whether federal or State*," *id.*, at 153, is excluded.

Golden State Transit Corp. v. City of Los Angeles ("Golden State II"), 493 U.S. 103, 110-11 (1989) (footnote omitted; emphasis added; alteration in original).[15] "[T]he interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another,' *Machinists*, 427 U.S. at 154, is a *right* specifically conferred on employers and employees by the NLRA." 493 U.S. at 112 (emphasis added). *See also id.* at 115 (Kennedy, J., dissenting) (agreeing that the interest in freedom from regulation originates in "Congress' intent to create the free zone of bargaining . . . described in *Machinists*").

Under labor law, impasse is *not* the end of the collective bargaining process, the bargaining unit, the duty to

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[15] Thus, petitioners' contention that the right to use economic weapons in the process of collective bargaining derives solely from state law, Pet. Br. 34-35, is incorrect. Whatever State law may provide, this is a right "implicit in the structure of the Act (as was the right to self-help upheld in *Machinists*)." *Livadas v. Bradshaw*, 114 S. Ct. 2068, 2075 n.11 (1994).

bargain, or the applicability of national labor policy and labor law. The collective bargaining *process continues*, albeit by immediate means other than negotiation, with a view to ultimate resolution by negotiation culminating in an agreement. The bargaining unit remains intact.[16] The duty to bargain survives, and can be activated by either side at any time. "[A]n impasse normally only suspends the duty to bargain, and changed circumstances may end the suspension." 1 Hardin at 696 (footnote omitted). National labor policy and labor law continue to apply, and continue to govern the conduct of labor and management, *during and after impasse* for the purpose of achieving agreement.[17] In sum, "[a]s a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Bonanno*, 454 U.S. at 412 (quoting *Charles D. Bonanno Linen Service*, 243 N.L.R.B. 1093, 1093-94 (1979)).[18]

B. The Same National Labor Policy and Labor Law Principles That Apply to Single-Employer Collective Bargaining Units Also Apply to Multi-Employer Units.

These principles of labor law apply to both single-employer and multi-employer collective bargaining units.

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[16] For example, in the absence of unusual circumstances, impasse does not justify an employer in withdrawing unilaterally from a multi-employer unit. *Bonanno*, 454 U.S. 404.

[17] For example, after impasse is reached, an employer may not unilaterally implement terms better than those previously offered to the union. *Katz*, 369 U.S. at 745. The employer also may not unilaterally change any term that was not a subject of bargaining with the unions. *NLRB v. Intracoastal Terminal*, 286 F.2d 954 (5th Cir. 1961). If the impasse resulted from bad faith bargaining or an unfair labor practice on the part of the employer, the employer is prohibited from implementing any unilateral changes. *E.g.*, *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960).

[18] Thus, the Solicitor General greatly exaggerates the practical and legal significance of impasse, and would give it further significance that is contrary to national labor policy.

Multi-employer units have long been accepted by national labor policy. "[I]n many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U.S. at 95. This Court has identified maintenance of the stability of the multi-employer unit as a "proper and pre-eminent goal" of labor law. *Bonanno*, 454 U.S. at 419.

As is true in the motion picture industry, multi-employer bargaining, outside the context of professional sports leagues, is entirely consensual.

> Unlike other bargaining units, the multi-employer unit is *consensual*. . . . The formation of the unit must be entirely voluntary, the assent of the union having representative status also being required. The Board will not approve the creation of such a unit over the objection of any party, union or employer.

1 Hardin at 511. *See also Bonanno*, 454 U.S. at 412; *Detroit Newspaper Publishers Ass'n*, 372 F.2d 569.[19] As in our industry, employers and unions in other industries consent to multi-employer bargaining because it provides to both sides substantial benefits.

When parties conduct collective bargaining on a multi-employer basis, they do so under the same national labor policy and the same rules of labor law that would apply if they bargained employer by employer. In principle, in entering into multi-employer bargaining, neither the union nor the employers gain or lose any rights, protections, or duties under labor law. *Cf.* 1 Hardin at 508.

A multi-employer unit does, of course, introduce additional complexities. Stability of the employer in a single-

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[19] Professional sports leagues are atypical of the general run of multi-employer bargaining units because a league is a joint venture and, together with its member clubs, is in some respects a single joint employer. *See North Am. Soccer League*, 613 F.2d at 1382. Thus, in the setting of a league, multi-employer bargaining may not be consensual.

employer unit ordinarily is not a concern. A multi-employer unit, however, can become unstable due to divisions originating within the employer group or to use of whipsaw tactics by a union.[20]

Labor law addresses these risks adequately by prohibiting (i) employer withdrawal from the unit once the bargaining process has begun, *Bonanno*; and (ii) any "separate agreements that would permit either the union or the employer to escape the binding effect of an agreement resulting from group bargaining," *id.* at 415; and by permitting (iii) a concerted lockout and hiring of temporary replacements in defense against a whipsaw strike, *Buffalo Linen*; *Brown Food*; and, arguably from analogy to the law governing an employer in a single-employer unit,[21] (iv) concerted maintenance of the status quo or (after impasse) imposition of previously offered terms.[22]

C. Concerted Unilateral Imposition by Employers in a Multi-Employer Bargaining Unit of Terms They Previously Had Offered to the Union Is Protected by National Labor Policy as a Permissible Economic Weapon During Impasse.

This Court has recognized that, after impasse is reached, unilateral imposition of terms is just another economic weapon. *Bonanno*, 454 U.S. at 415-16 n.9. Petitioners' argument, Pet. Br. 34-37, that such action is simply a return to "backdrop rights" under state law and not use of an economic weapon fine-tuned by federal labor law, is incorrect.

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[20] " 'Whipsawing' is the process of striking one at a time the employer members of a multi-employer association." *Buffalo Linen*, 353 U.S. at 90 n.7. *See also Bonanno*, 454 U.S. at 421 n.1 (Burger, C.J., dissenting).

[21] Neither the Solicitor General nor petitioners contend that, in a multi-employer bargaining unit, the employers' concerted unilateral imposition during impasse of terms previously offered to a union is an unfair labor practice.

[22] Whipsaw interim agreements are permitted after impasse has been reached. *Bonanno*, 454 U.S. at 413.

Under the NLRA, an empoyer's background right to set the terms of employment disappears when a collective bargaining relationship is established; and it is not restored as long as that relationship continues—whether or not bargaining is actually occurring. *Cf. Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 n.15 (1987) (referring to "the basic fact that a nonunion employer is freer to set employment terms than is a unionized employer"). Labor law views any change in terms not as the mere operation of a business, but as the use of an economic weapon that may subvert both the union's role as representative of the employees and the overall process of good-faith collective bargaining. Precisely because it views the changing of terms as an economic weapon, labor law regulates it closely—just as it regulates strikes, lockouts, and other economic weapons.

Thus, an employer is prohibited by labor law from changing terms in a way that would undermine the union or the collective bargaining process. *See Katz*, 369 U.S. at 745; *Insurance Agents*, 361 U.S. at 485. In general, during negotiations, an employer must maintain the status quo, *Katz*, 369 U.S. at 743; and, in a multi-employer unit all the employers must do so. After impasse is reached, an employer's labor law right to impose terms unilaterally is limited to those previously offered to the union, *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949); and, in a multi-employer unit, the same rule presumably applies to concerted action by the employers, 1 Hardin at 508.

The NLRB and this Court long ago rejected the notion that economic weapons are limited to the strike and lockout. Both employers and unions can use economic weapons that are not mentioned in the NLRA but nonetheless are recognized by the NLRA.[28] *See, e.g., Insur-*

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[28] Petitioners argue, without support, that the unilateral imposition of terms is somehow outside the free zone for economic weapons because it is not "painful for *both* sides." Pet. Br. 36 (emphasis in original). Also not painful for both sides, however, are, *e.g.*, employees' slowdowns and other harassing tactics, (recog-

ance Agents; *Machinists*; *Bonanno*. Unilateral imposition of terms is simply one of the permitted forms of economic pressure (and less harmful to the employees than a lockout), which becomes available once the obligation to maintain the status quo disappears upon impasse. That it is part of the continued operation of a business does not distinguish it from other economic weapons, *e.g.*, hiring of replacement workers.

Petitioners assert that employers will bargain to impasse in order to impose terms indefinitely. Pet. Br. 41. Impasse, however, is almost always temporary; and almost all labor disputes end in agreement. After impasse is reached, it is economic pressure (by both unions and employers) that brings parties back to the bargaining table and to agreement.

In sum, unilateral imposition of terms during impasse is among the economic weapons permitted and protected by national labor policy and labor law.

D. A Labor Market Subject to Collective Bargaining Is Peripheral to Antitrust Law.

It is undisputed that the employer conduct challenged by petitioners affected only the labor market. Pet. App. 30a n.8. Therefore, the concerns about effects on product markets that underlie *Allen Bradley*, *Pennington*, and *Connell* are absent.

Historically, in the absence of alleged effects on product markets, there has been little antitrust interest in the conduct of parties in labor markets subject to collective bargaining. Apart from a small number of private cases involving professional sports leagues during the last twenty years or so, *see* Pet. Br. 22 n.13, during the 106

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nized as a permitted economic weapon in *Insurance Agents*, 361 U.S. at 490), employees' appeals to managements of companies doing business with an employer (recognized as a permitted economic weapon in *Teamsters v. Morton*, 377 U.S. 252, 259 (1964)), and employers' hiring of permanent replacements for economic strikers (recognized as a permitted economic weapon in *Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983)).

years since enactment of the Sherman Act this has not been an area to whose governance antitrust has made a substantial contribution. In view of the long history and widespread use of multi-employer bargaining, *see* Pet. App. 25a-28a, the paucity of antitrust litigation in this area is strong evidence that it is peripheral to antitrust concerns.[24]

This historical record also reflects the fact that antitrust has little to contribute to the resolution of labor disputes. If applied to such a dispute, the antitrust impulse to promote consumer welfare by attacking supplier cartels would be blocked by the statutory exemption. *E.g., Apex Hosiery*, 310 U.S. at 504. If applied to a multi-employer bargaining unit, the antitrust impulse to promote economic efficiency by attacking a buyer cartel would be blocked by the employers' labor law duty to act in concert in the bargaining process. As the instant case illustrates, antitrust can function, at most, to readjust the relative bargaining power of employees and employers. In the end, the labor dispute would be resolved not by antitrust law but by a collective bargaining agreement; antitrust would be merely one factor influencing the terms of that agreement.

In this kind of market, antitrust would not protect or promote competition. In an industry without concerted restraints on employer competition for employees (*e.g.*, the motion picture industry), antitrust would not increase competition among employers. The employer "restraints" that would be attacked under the Sherman Act (*e.g.*, concerted lockouts) operate not against individual employees one by one or outside the context of negotiating a new contract, but rather only against the employees collectively and during a labor dispute in the context of collective bargaining. The "restraints" are simply weapons

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[24] *See* 1 Philip Areeda & Donald F. Turner, *Antitrust Law* ¶ 229d, at 202 (1978) ("Apart from the peculiarity of the sports case, the general propositions are clear enough. In a context where a union enjoys a collecitve bargaining immunity, the employer would normally enjoy the same immunity.").

in the economic warfare that is part and parcel of collective bargaining. They have no other function, purpose, or existence. Even in a sports league, antitrust would not directly increase competition. True, the employees might use their bargaining power (enhanced by an antitrust claim or by antitrust deterrence of concerted employer defenses against whipsaw tactics) to achieve *in the bargaining* increased competition among teams for players. They might instead, however, use that same power to bargain for, *e.g.*, higher minimum pay or better benefits. Any increase in competition would be directly attributable not to antitrust but to the bargaining goals of the parties.

Judge Wald's concern that a sports league's monopsony power might reduce the supply of talented athletes "to the detriment of consumers," Pet. App. 41a, is misplaced.[25] First, in this case, it is undisputed that no such

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[25] Petitioners and Judge Wald hypothesize that employers acting in concert are a collective monopsony and therefore are economically inefficient. This hypothesis is factually questionable outside a sports league; and, even as applied to a sports league, is incorrect as a matter of economic theory.

In many industries, *e.g.*, trucking, construction, sheet metal, multi-employer bargaining units commonly do not include all employers, and therefore do not have monopsony power.

Even where it is arguable, as in the case of a sports league, that the employers in the aggregate have monopsony power, there is no reason to believe the outcome of collective bargaining would be economically inefficient. The employers face a monopolist union; therefore, there is a bilateral monopoly. Under economic theory, in such a labor market, the quantity of labor demanded will be the same as it would be if the union and all the employers constituted a single firm, which set its demand for labor at the level that maximized its profit. In such a market the price of the labor, within certain bounds, is irrelevant to the quantity supplied because "price is *not* a rationing device under conditions of bilateral monopoly. Instead, it is just a means of dividing the profit between the two parties." Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 116 (1993) (emphasis in original). The profit-maximizing quantity of labor depends not on the bargain between union and employers (within certain bounds), but on the size of the product market in which the employers participate. If, indeed,

effect occurred. Pet. App. 29a n.8. Therefore, on this record, Judge Wald's concern is speculative. Second, as the film "Hoop Dreams" illustrates, there is no shortage of young athletes aspiring to play in a professional sports league. The notion that current levels of compensation in professional team sports are artificially depressing the supply of talented athletes is implausible.[26] Third, more generally, and more importantly, where a union and employers consent to a multi-employer bargaining unit, under national labor policy the compensation for the employees in the unit is to be determined not by competition among the employers but by, or in accordance with, a collective bargaining agreement. National labor policy has no preference for setting compensation by competition among employers. A collective bargaining agreement may specify a procedure for determining compensation; that procedure may be competition; and that competition may be constrained by whatever restrictions the union and employers include in the agreement. Alternatively, and far more commonly, the agreement may specify levels of compensation and preclude wage competition altogether.

In sum, a labor market subject to collective bargaining is, at most, peripheral to antitrust law.

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the NFL is an economically significant monopoly, then it is very likely that the compensation of members of the NFLPA is above the economically optimal level and includes a share of the NFL's monopoly profit. Even without a bilateral monopoly, there is little chance that there will be any deadweight loss from monopsony in this market because labor is not fungible and employers will be able to discriminate to maximize economic efficiency. *See* Richard A. Posner & Frank H. Easterbrook, *Antitrust* 150 (2d ed. 1981).

[26] Moreover, it is far from clear that consumers are better served by a league that abolishes all restraints on free agency and as a result pays the highest competitive salaries and attracts the best athletes than by a league that retains some such restraints, pays somewhat lower salaries, attracts somewhat less talented athletes, but has more evenly-matched teams. Judge Wald's economic analysis (the more the players are paid, the better for consumers) cannot explain why some fans, faced with a choice, would prefer to watch college basketball or football rather than professional because they view it as a better game.

E. In a Labor Market Subject to Collective Bargaining, Conduct by Employers or Unions Directly Affecting Only the Labor Market Should Be Governed by National Labor Policy Rather Than by National Antitrust Policy.

Labor law and antitrust law are both about process, not economic results. Each dictates a particular kind of process for achieving results; neither dictates the results themselves.[27]

Labor law establishes a framework for the process of collective bargaining: organization of employees into unions; recognition of unions by employers; and, between unions and employers, negotiations backed by permitted economic weapons. That framework "is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp.*, 452 U.S. at 678; *see also American Ship*, 380 U.S. at 317. A principal function of unions is to eliminate competition over wages. *See Jewel Tea*, 381 U.S. at 692-93 (opinion of White, J.); *id.* at 711 ("[B]usiness competition based on wage competition is not national policy.") (opinion of Goldberg, J.).[28]

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1994), mandates competition as the process for economic effi-

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[27] Thus, contrary to the analogy drawn in S.G. Br. 23, labor law and antitrust law are quite different from the Fair Labor Standards Act and the Occupational Safety and Health Act, which are concerned not with the process by which substantive results (fair labor standards, workplace safety) are reached, but with the substantive results themselves.

[28] Petitioners' contention, Pet. Br. 33, that they have organized to preserve competition distorts reality. If all that petitioners wanted were competition, there would be no collective bargaining process. By choosing to organize and enter into such a process, petitioners seek the substitution of a collective bargaining agreement for a regime of unrestrained competition. The existence or non-existence of competition among the employers for the services of petitioners will be determined not by the antitrust laws but by the outcome of the bargaining process.

ciency and consumer welfare. Similarly, Section 2 of the Act, 15 U.S.C. § 2 (1994), bars actual and attempted monopolization, but not the acquisition of monopoly by "skill, foresight and industry." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (L. Hand, J.).

The two processes around which labor law and antitrust law, respectively, are organized are fundamentally different.

In the case of a multi-employer bargaining unit, labor law affirmatively permits the concentration of economic power on both the employee and employer side, directs that the two aggregates bargain in good faith, and authorizes them, in accordance with certain rules, to resort to concerted use of economic weapons to bring about ultimate agreement. National labor policy discourages resort to the courts to resolve labor disputes.[29]

The process dictated by antitrust law is competition. In the absence of the Clayton and Norris-LaGuardia Acts and the non-statutory exemption, if antitrust would apply to a labor market it would require competition among employees and competition among employers as the processes that would determine the terms and conditions of employment. Antitrust policy, moreover, encourages resort to the courts to resolve claims of antitrust violations. A fundamental problem with petitioners' position is that it would involve the courts in the forbidden task of balancing the economic power of employers and unions. Concerted behavior by a multi-employer group is part of the collective bargaining process protected by national

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[29] Originally, that policy was directed to protection of the organizational activities of employees from judicial interference. *See, e.g., United States v. Hutcheson*, 312 U.S. 219, 229-31 (1941). Subsequently, the policy was given broader scope. "While the Norris-LaGuardia Act's bar of federal-court labor injunctions is not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714 (1981).

labor policy; antitrust actions are not. Where labor markets are subject to collective bargaining, courts should not be regulating labor relations or attempting to resolve labor disputes in those markets in the guise of applying the Sherman Act.

In the context of a labor dispute, the process called for by national labor policy and that called for by antitrust policy are not merely different, but competing. The Solicitor General argues they are not competing because, once impasse is reached, employers can comply with both labor law and antitrust law. S.G. Br. 17. In some circumstances, however, that is impossible. If each employer acts individually and continues to operate, it must choose either the status quo or terms offered to the union; and both may require concerted action that the employees would attack on antitrust grounds. An employer who sought to avoid antitrust liability by individually imposing terms less restrictive and therefore more generous than both the status quo and the multi-employer offer would commit an unfair labor practice.

More fundamentally, the test proposed by the Solicitor General is inappropriate. The appropriate test is whether national labor policy can be fulfilled if the non-statutory exemption does not encompass, but leaves subject to antitrust challenge, concerted resort by employers to economic weapons as permitted under labor law.[30]

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[30] The Solicitor General acknowledges that "the antitrust laws should yield to the more specific and later enacted, obligations of the NLRA" where the two conflict. S.G. Br. 16. The Solicitor General recognizes a conflict, however, only when the legally enforceable obligations the two laws impose on employers directly conflict. Thus, the logic of the Solicitor General's test would preclude immunity for employers' concerted use of economic weapons even before impasse, a consequence the Solicitor General does not propose. Moreover, the Solicitor General apparently does not recognize a conflict when the policies of the two bodies of law conflict or when the processes they require conflict. The Solicitor General's position is thus analogous to one that recognizes that a State law is preempted by a federal law when it imposes an obligation inconsistent with an obligation imposed by the federal law,

National labor policy cannot be fulfilled if employers in a multi-employer bargaining unit are subject to liability for concertedly making "use of economic pressure . . . [that] is part and parcel of the process of collective bargaining." *Insurance Agents*, 361 U.S. at 495. National labor policy embraces multi-employer bargaining units and protects the stability of such units. Such units will not be stable if, during impasse, employers risk antitrust liability if they respond to a whipsaw strike with a concerted lockout or if they respond to union efforts to obtain whipsaw interim agreements with concerted maintenance of the status quo or concerted imposition of terms. Nor is national labor policy fulfilled if employers, having entered into a multi-employer unit with the consent of the union, and having an ongoing duty to bargain concertedly, must risk antitrust liability if they concertedly resort to economic weapons permitted by labor law to advance their bargaining position. National labor policy requires that employers under a duty to bargain concertedly be able to support their bargaining with concerted use of economic weapons; antitrust law would strip employers of that ability.

Thus, although exemptions from the antitrust laws should be no broader than is "necessary to make the [conflicting statutory scheme] work," *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963), *cited in* S.G. Br. 13, here the minimum exemption necessary to make national labor policy work is an exemption for the process of collective bargaining, including resort to concerted use of economic weapons as permitted by labor law. National labor policy cannot be fulfilled if concerted conduct in the labor market that labor law treats as a right, *Golden State II*, 493 U.S. at 110-12; *Livadas*,

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but not when its provisions would frustrate implementation of the policy of the federal law. In the field of preemption, this Court has rejected such an approach. *See, e.g., Connell*, 421 U.S. at 635 ("The Court has held repeatedly that federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the NLRA.").

114 S. Ct. at 2075 n.11, can be treated under antitrust law as a wrong.

IV. THIS COURT SHOULD NOT EXCLUDE THE CONCERTED LOCKOUT IN A MULTI-EMPLOYER BARGAINING UNIT FROM THE NON-STATUTORY EXEMPTION.

This Court should reject the Solicitor General's invitation to go beyond the facts of the case by holding that the non-statutory exemption does not protect *any* concerted employer conduct during impasse. S.G. Br. 17-26.

The Solicitor General, contrary to the position of Judge Wald in dissent, *see* Pet. App. 22a n.7,[31] would, after impasse is reached in a multi-employer bargaining unit, lump the concerted lockout and other concerted employer use of economic weapons with the concerted unilateral imposition of terms, and would subject them all to antitrust challenge. *Id.* at 18 n.5. That approach would conflict with "the proper and pre-eminent goal [of] maintaining the stability of the multiemployer unit." *Bonanno*, 454 U.S. at 419.

> [T]he ground rules for multiemployer bargaining have not come into being overnight. They have evolved and are still evolving, as the Board, employing its expertise in the light of experience, has sought to balance the "conflicting legitimate interests" in pursuit of the "national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 355 U.S. at 95, 96.

Id. at 413. Among the ground rules that the Board has established, and this Court has approved, is the right of employers in a multi-employer unit to resort to a concerted lockout. *See Buffalo Linen*, 353 U.S. at 97; *Brown Food*, 380 U.S. at 285 (allowing hiring of tem-

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[31] At least at some points in their brief, petitioners appear to agree with Judge Wald, rather than with the Solicitor General, on this issue. *See* n.7, *supra*.

porary replacements necessary to preserve "the right of lockout recognized by *Buffalo Linen*").

In *Bonanno*, this Court approved a Board rule that impasse was not a sufficiently significant or unusual circumstance to justify withdrawal by an employer from the multi-employer unit. *Bonanno* reflects a view not merely of impasse, but also of the relationship among the employers in such a unit after impasse is reached. The employers continue to be bound together even during impasse. *See id.* at 414.

Buffalo Linen and *Brown Food* each involved a concerted lockout before impasse, and *Bonanno* involved an attempt to withdraw from the multi-employer unit during impasse. Thus, none of these cases involved a concerted lockout during impasse. Nevertheless, the rationales underlying all three cases—protection of the stability of the multi-employer unit, legitimacy of resort to economic weapons in aid of collective bargaining—together with the relative insignificance of impasse in the overall collective bargaining process, support protection, under the non-statutory exemption, of the use of a concerted lockout as an economic weapon during impasse.

As this Court has recognized, whipsaw tactics can destroy a multi-employer unit. *Brown Food*, 380 U.S. at 283-85; *see also Buffalo Linen*, 353 U.S. at 96. The only effective defense, before or after impasse is reached, is concerted action by the employers. Therefore, the concerted lockout and other economic weapons necessary to preserve multi-employer units should be protected by the non-statutory exemption from antitrust attack.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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